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IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1176

NORTH DAKOTA STATE BOARD OF PHARMACY
Petitioner,

v.

SNYDER'S DRUG STORES, INC., *Respondent*

On Writ of Certiorari to the Supreme Court of North Dakota

**BRIEF OF AMICUS CURIAE OF THE NATIONAL
ASSOCIATION OF CHAIN DRUG STORES, INC.,
IN SUPPORT OF RESPONDENT**

THOMAS D. QUINN, JR.
REASONER, DAVIS & VINSON
Counsel for Amicus Curiae
800-17th Street, N.W.
Washington, D.C. 20006

Of Counsel
HAROLD ROSENWALD
185 Devonshire Street
Boston, Mass. 02110

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INTEREST OF THE AMICUS

This Amicus Curiae Brief is filed, with the consent of counsel for the parties, on behalf of the National Association of Chain Drug Stores, Inc., (NACDS), a New York not-for-profit corporation supporting Respondent and urging the Court to affirm the decision of the Supreme Court of North Dakota.

NACDS represents a membership of 238 chain drug corporations which operate approximately 9500 retail drug stores and leased pharmacy departments throughout the United States. The member firms of NACDS employ over 25,000 pharmacists licensed to practice their profession in each of the states where they are located. In addition, NACDS members employ over 150,000 non-professional personnel in providing a wide variety of products and services to the public. In 1972, their annual sales accounted for 8.7 billion dollars, or 60.1% of the total retail drug market, and their prescription drug volume amounted to 1.5 billion dollars representing over 383 million individual prescriptions.¹

The entry of chain stores into the retail drug business about a half century ago engendered a massive resistance on the part of the independent pharmacists. They organized national, state and local pharmacy associations, which have used every available political, legislative and litigation means to impede and obstruct the entrance of chain stores into the retail drug market.² NACDS' vital interest in this case stems from this long-standing attempt by independent pharmacists and their national and state associations to obstruct the entrance of chain stores into the retail drug market.

The enactment of the type of statute³ held unconstitutional by the Supreme Court of North Dakota in the instant case is one method utilized by chain store opponents to restrict competition.

¹ 1973 Annual Report of Chain Drug Industry, Chain Store Age, pp. 26-28 (May, 1973).

² F. Marion Fletcher, *Market Restraints in the Retail Drug Industry*, pp. 137, 273 (1967), University of Pennsylvania press.

³ North Dakota Century Code, Section 43-15-35(5).

North Dakota is the only state to have enacted such an ownership law since the early 1930s⁴ under the guise of protection of the health and welfare of its citizens, citing as an "evil" the control of professional pharmacists by lay persons.

NACDS does not quarrel with the concept that a pharmacist is a "professional" and it agrees with the need for high professional and ethical standards on the part of all pharmacists. However, we vigorously disagree with the theme that runs through petitioner's brief and that of the opposing *amici curiae* that a pharmacist employed by a chain drug store would be subjected to some pressure to act in an unprofessional way or is less ethical or less professional than the owner-pharmacist or the pharmacist employed by an independent drug store. There is simply no evidence to justify these unfounded conclusions.

Although the modern chain drug store offers a greater variety of products and services than its predecessors, the pharmacy, or prescription department, has always retained its place as the most valuable and important part of the chain drug store. The requirements for active membership in NACDS emphasizes the importance of the pharmacist and make a pharmacist's presence mandatory in each member store. Article III Section 2 of the NACDS By-laws reads as follows:

"Section 2—Active Members: Any person, firm or corporation engaged in operating retail drug stores shall be eligible for Active Membership in the Corporation. Retail drug stores shall mean four (4) or more stores in each of which there is a regis-

⁴ F. Marion Fletcher, *Market Restraints in the Retail Drug Industry*, pp. 143-145, *supra*.

tered pharmacist regularly employed to dispense prescriptions and for professional counsel. Any person, firm, or corporation operating less than four (4) stores who is a member in good standing at the time of passage of this section [May 7, 1967] of the By-Laws shall not be ineligible for membership." (Emphasis supplied).

In addition, Article I of the NACDS Code of Ethics signifies the fundamental precept of the advancement of the profession of Pharmacy as an integral part of NACDS' policy. Article I reads as follows:

"Every member shall promote and advance the profession of pharmacy as the foundation of our industry and shall jealously guard its good name."

NACDS respectfully submits that the stock ownership type of statute held unconstitutional in this case affords a select group the means to restrain trade and prevent competition in the retail drug market. For this reason the judgment of the Supreme Court of North Dakota was clearly correct and should be affirmed.

ARGUMENT

I

Section 43-15-35(5) of the North Dakota Century Code Violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

In the North Dakota Supreme Court, respondent asserted that the Board's denial of a permit to operate a drug store for failure to meet the stock ownership requirements, violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. (Petition for Cert., p.20). However, the North Dakota Supreme Court rested its decision exclusively on the due process clause, relying upon, and consider-

ing itself bound by, *Liggett Co. v. Baldrige*, 278 U.S. 105 (1928).

The North Dakota statute classifies corporations on the basis of stock ownership. Thus a corporation which does not meet the ownership requirements of the statute is ineligible for a permit even though the pharmacy department of its proposed drug store would be under the management of pharmacists registered in North Dakota. The practical effect of the provisions of the stock ownership provision of the statute is to limit the ownership of pharmacies and drug stores to a small select class of people, namely pharmacists licensed to practice in North Dakota. This classification cannot be justified under any view of the legitimate purpose of the statute. The scope of permissible regulation of the retail drug business was defined in *Milligan v. Board of Registration in Pharmacy*, 204 N.E. (2d) 504 (Mass., 1965) at pages 510-511:

"Thus, the Legislature may regulate pharmacists and drug stores in a manner reasonably designed and appropriate to insure competence and diligence on the part of pharmacists, cleanliness of premises, the purity and safety of products sold, the prevention of the unlawful sale of narcotics and similar health matters."

"When regulation is attempted beyond such matters more difficult questions of constitutional validity may arise concerning whether particular statutes, regulations, or policies or their application in particular circumstances, bear a reasonable relation to significant aspects of the public interest. Particularly is this so in respect of occupations, other than those (for example, insurance, banking, public utility operation, and the traditional professions) most obviously appropriately subject to public regulation. If such other occupations are

to be regulated in a manner which materially restricts qualified persons from engaging them, it is of special importance that there be apparent the public grounds which constitutionally justify the interference with such persons' freedom of employment and business activity."

"The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972).

In *Smith v. Cahoon*, 283 U.S. 553 (1931), a Florida statute prohibited any auto transportation company from operating any motor vehicle for the transportation of persons and property on the public highways without having first obtained from the Railroad Commission a certificate of public convenience and necessity and furnishing a bond for the protection of freight and passengers, but excepted from its requirements transportation companies engaged exclusively in transporting farm products, fish and shell fish, or dairy products. This Court held the statute unconstitutional upon the ground, among others that it denied equal protection of the laws, because "there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities." 283 U.S. at page 567. See, also, *Hartford Steam Roller Inspection & Ins. Co., et al. v. Harrison*, 301 U.S. 459 (1937).

Morey v. Doud, 354 U.S. 457 (1957), involved an Illinois statute which provided for licensing, inspection,

bonding and regulation of so-called "community currency exchanges" engaged in the business of cashing checks and issuing or selling money orders, but specifically exempted from its provisions money orders of the American Express Company. This Court held the statute invalid, as applied to the complainants, on the ground that it denied equal protection of the laws to those subject to the statute because of the exemption of American Express Company money orders, which were sold in competition with money orders issued and sold by the complainants. The Court based its decision on "the remote relationship of the statutory classification to the Act's purpose or to business characteristics, and the creation of a closed class by singling out of the money orders of a named company, with accompanying economic advantages." 354 U.S. at page 469.

Morey v. Doud, supra, has been cited as authority in recent decisions of this Court involving political or personal rights. See *Bullock v. Carter*, 405 U.S. 134 (1972); *Weber v. Aetna Casualty & Surety Co.*, supra.

The classification under the North Dakota statute is clearly not related to a "legitimate state purpose" since its obvious purpose is to eliminate chain drug stores from the North Dakota market.

II

Section 43-15-35(5) of the North Dakota Century Code Violates the Commerce Clause, Art. I, Section 8, Clause 3 of the Constitution of the United States.

NAOCS is aware that the question of whether 43-15-35(5) of the North Dakota Century Code violates the commerce clause was not raised below, but, as subsequent argument will show, the commerce clause violation is so entirely clear that the Court ought to

take notice of it now, affirm the judgment below and thereby put an end to what otherwise may prove to be a costly and time-consuming litigation. Moreover, it would seem that the commerce clause issue may be considered under the equal protection or due process issue. See *Baldwin v. Seelig, Inc.*, 294 U.S. 511 (1935).

The purpose and effect of the North Dakota statute is to exclude from the North Dakota retail drug market virtually all chain drug stores. Such stores are for the most part owned by corporations which are engaged in business in many states.

There has been, and continues to be, a steady growth of chain drug stores and large independent drug stores, whereas medium independent and small independent drug stores have been declining in number.*

Chain drug stores have an important position in the retail drug business throughout the United States. According to the *amicus curiae* brief of the American Pharmaceutical Association, et al., at page 11, chain drug stores controlled 60.1% of the total national drug sales volume in 1972. Attached as Exhibit A to this Brief is a table showing in 1972 the total number of drug stores, the number of such stores owned by chains, and the chain drug store share of market in sixteen metropolitan areas throughout the United States.†

The widespread acceptance of chain drug stores is undoubtedly due to the benefits which they have produced for consumers. Chief among those benefits are

* 38th Annual Nielsen Review of Retail Drug Store Trends, p. 7—chart 2.

† 1973 Annual Report of the Chain Drug Industry, Chain Store Age, pp. 18-19 (May, 1973).

lower prices for prescription drugs. Thus, the following table shows that the average prices of prescription drugs have been substantially lower in chain drug stores than in independent drug stores during the years 1966 through 1972.⁷

Average Prescription Price

Year	Chain Drug Stores	Independent Drug Stores
1966	3.16	3.59
1967	3.22	3.66
1968	3.29	3.70
1969	3.51	3.90
1970	3.63	4.06
1971	3.73	4.21
1972	3.91	4.36

The Court can take judicial notice that the drugs sold in all drug stores are produced by drug manufacturers which distribute their products throughout the United States. In the light of these facts it is apparent that the retail drug business is an integral part of a national distribution system which delivers prescription drugs to millions of consumers throughout the United States.

The stock ownership statute is aimed at preventing outsiders, non-residents, and foreign corporations from entering the North Dakota retail drug market. It is based on a philosophy of economic parochialism or

⁷ Prescription Drug Data Summary—1972 Department of Health, Education and Welfare, DHEW Publication No. (SSA) 73-11900 p. 31; 1973 Annual Report of the Chain Drug Industry, Chain Store Age, p. 28; 1971 Annual Report of the Chain Drug Industry, Chain Store Age, p. 25.

isolation as opposed to a free national market. It establishes a system of excessive protectionism for North Dakota pharmacists and erects a barrier against chain drug corporations. It bans more efficient enterprises to protect resident pharmacists from competition. This protectionism is inconsistent with the philosophy of the Constitution, which contemplates free, unencumbered trade among the states.

The statute should be declared unconstitutional under the doctrine enunciated in *Baldwin v. Seelig, Inc.*, 294 U.S. 511 (1935). In that case this Court declared unconstitutional under the due process and commerce clauses a New York statute which forbade the sale of any milk produced outside of that state which was purchased from the producer at a price lower than that required to be paid for milk produced within that state. The opinion of Mr. Justice Cardozo states, at page 527:

"What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. The form of the packages in such circumstances is immaterial, whether they are original or broken. The importer must be free from imposts framed for

the very purpose of suppressing competition from without and leading inescapably to the suppression so intended."

This Court rejected the claim that the New York statute was within the police power since it would protect the health of local residents by assuring a regular and adequate supply of milk through the maintenance of minimum prices, and perceived the true purpose of the statute to be the suppression of competition. Equally, petitioner's elaborate justification of the North Dakota statute on the grounds of public health should be rejected and the statute should be regarded in its true light. In *Baldwin* this Court also refused to accept the argument that lower milk prices to producers would result in uncared for cattle and concluded that such evils should be dealt with directly. Similarly, in the present case, any evils relating to the control of drug stores have already been remedied by direct regulation without resorting to the exclusion of drug stores owned by the forbidden corporations. (Respondent's Brief pp. 13-14)

If the ownership of drug stores by corporations, as prohibited by the North Dakota statute, is an evil, then the appropriate remedy would be legislation by Congress rather than state legislation which would lead to "rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." *Baldwin*, at page 522.

In *Dean Milk Co. v. City of Madison, et al.*, 340 U.S. 349 (1951), this Court held unconstitutional under the commerce clause an ordinance of the City of Madison which prohibited the sale of milk within that city unless it was processed and bottled at an approved plant within a radius of five miles from the central square

of the city. Citing *Baldwin v. Seelig, Inc.*, supra, the opinion of Mr. Justice Clark stated, at page 354:

"In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available."

The Court found that reasonable and adequate alternatives were available to Madison, as they are in the present case. It should be noted that in these cases the Court has formed its own conclusions as to the purpose of the challenged laws and has refused to sustain discriminatory economic legislation which is justified upon the pretext that it is related to the public health and safety. Moreover, less restrictive alternatives, adequate to meet the reasonable needs of the community, were required to be substituted for the extreme remedies that had been adopted.⁸

III

Section 43-15-35(5) of the North Dakota Century Code Violates the Due Process Clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The question of the constitutionality of stock ownership statutes similar to the one in the instant case was properly put to rest in 1928 by this Court's decision in *Liggett Co. v. Baldridge*, 278 U.S. 105, on the ground that the statute did not bear a real and substantial

⁸ Struve, The Less-Restrictive-Alternative Principle and Economic Due Process, 80 Harv. L. Rev. 1463 (1967).

relation to the public health, safety and morals, or some other phase of the general welfare.

This type of stock ownership statute only serves to protect the vested interest of independent pharmacists and those other owners already operating drug stores in the state. Thus, a corporation which does not meet the stock ownership requirements of the statute is ineligible for a permit even though the pharmacy department in the drug store would be under the management and supervision of a pharmacist duly licensed under the laws of the State.

If the purpose of the statute was to protect the public health, safety, morals and general welfare of the public, the ownership requirements are at best irrelevant. Indeed, the statute may have an adverse effect upon the public safety and health since the pharmacists must have a direct interest in the profits of the enterprise. It is readily apparent that the real purpose of the statute is to exclude chain drug stores from the retail drug business in North Dakota.

Petitioner, at page 11 of its brief, argues that:

"[t]he basic issue under the North Dakota statute is not one of ownership, but rather of control of the supervision and management of the pharmacy."

To the extent that the statute requires the pharmacy departments of drug stores to be under the control of pharmacists, it is not open to objection. In fact, *Amicus* would and does support such a requirement. But the statute goes much further and requires that the "majority stock" of a corporation eligible for a drug license must be *owned* by registered pharmacists.

It is the ownership requirement that raises the critical issue in this case.

At pages 14-18 of its brief, petitioner cites numerous unsupported allegations in an attempt to show that the stock ownership restrictions of the statute are related to the public health, safety and welfare.

NACDS would challenge the totally unsupported claims of petitioner that the "hired pharmacist" will insist that he is compelled "to yield to unlawful directions of untrained superiors"; or that ownership of drug stores by pharmacists would ease the task of enforcement agencies in dealing with unethical conduct; or that the ownership of drug stores by non-licensed individuals or corporations tends "to demoralize a professional undertaking by subjugating the professional standards to destructive commercial interests"; or that miracle drugs and "drug problems" make it more important that "the practice of pharmacy be free from commercialism"; or that the ownership of drug stores by pharmacists "will tend to assure a higher standard of competence in pharmacist-employees"; or that ownership of drug stores by non-pharmacists will create a risk that "social accountability will be subordinated to the profit motive", or that under laws which permit "purely commercial interests" to own drug stores, "the policies, practices and conduct of pharmacies are frequently unduly influenced by such commercial interests." (Petitioner's brief, pp. 15 *et seq.*)

The unsupported so-called "evils" set forth above are basically the same as were advanced in an effort to support the Pennsylvania Statute declared unconstitutional by this Court in *Liggett Co. v. Baldrige*, *supra*. It is interesting to note the language of the Court in holding that there was a total lack of evidence

that mere ownership of a drug store by one not a pharmacist threatens the public health, and stated as follows:

"If detriment to the public health thereby has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced, and, so far as we are informed, either by the record or outside of it, none exists. The claim, that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance." 278 U.S. 105, 114.

Here, some 45 years later, we find the North Dakota State Board of Pharmacy making the same claims without producing any supporting evidence whatsoever. One would think that if such evidence were available, petitioner would have been able to gather and produce it over a span of 45 years.

There is absolutely no reason or evidence available to allege that pharmacists employed by chain drug stores are any less competent or ethical than pharmacists employed by other pharmacists or pharmacists who own their own stores; or that any of the dangers imagined by the petitioner will be avoided if ownership of drug stores is confined to pharmacists. If the profit motive or "commercialism" causes such dangers, there is no reason to assume that a pharmacist who owns a drug store and pays rent and meets a payroll is immune from the motive to operate his business profitably. To characterize the motive as "commercialism" is to intimate that there is something improper in the corporate organization of industry and that enterprises owned by corporations could endanger the public health and safety.

CONCLUSION

On these principles, the decision below should be affirmed. If the rationale of *Liggett Co. v. Baldridge*, supra, is not consistent with later decisions of this Court, its holding should be reaffirmed on the basis of the economic considerations referred to herein and the above decisions of this Court declaring invalid laws designed to protect local interests from outside competition.

Respectfully submitted,

THOMAS D. QUINN, JR.
REASONER, DAVIS & VINSON
Counsel for Amicus Curiae

Of Counsel:

HAROLD ROSENWALD

EXHIBIT A

<u>Metropolitan Market</u>	<u>No. of Drug Stores</u>	<u>No. Chain Drug Stores</u>	<u>Chain Drug Store % Share of Market</u>
New York	3,492	380	16.2
Chicago	1,867	614	56.2
Los Angeles-Long Beach	1,501	701	73.9
Washington, D. C.	559	330	84.0
Detroit	933	257	46.6
San Francisco-Oakland	812	411	72.1
Philadelphia	1,559	258	29.8
St. Louis	640	323	65.5
Boston	1,029	139	17.8
Baltimore	529	189	54.1
Cleveland	490	201	67.0
Pittsburgh	723	261	66.0
Minneapolis-St. Paul	366	133	52.7
Anaheim-Santa Ana	225	71	36.1
Seattle-Everett	362	112	44.0
Denver	306	127	60.4